mailed 5/18/98

In the Matter of:	
Lawrence J. O'Brien Claimant	
against	Case No.: 98-LHC-245
John T. Clarke & Sons Employer	OWCP No.: 1-138232
and	
Liberty Mutual Ins. Co. Insurer	

Appearances:

Michael F. Walsh, Esq.
For the Claimant

Jean M. Shea, Esq.
For the Respondents

Before: **DAVID W. DI NARDI**

Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq**.), herein referred to as the "Act." The hearing was held on February 3, 1998 in Boston, Massachusetts, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs have been admitted into evidence as CX 8 and RX 1-11. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Preliminary Evidentiary Issue

Respondents have moved to submit into evidence the January 20, 1988 Order of Payment §35 issued by Administrative Judge Emogene Johnson of the Massachusetts' Department of Industrial Accidents. (RX 1-1) Respondents intend to offer the document for its collateral estoppel effect on the issue of the extent of Claimant's disability. (TR 13) Claimant objected on the grounds that the Order is a temporary order which has been appealed. (TR 12)

It is clear in the First Circuit that an administrative law judge must give collateral estoppel effect to a workers' compensation decision so long as the traditional requirements for that doctrine to apply have been met. **See Bath Iron Works Corp. v. Director, OWCP**, 125 F.3d 18 (1st Cir. 1997). That is, there must be a determination over an issue which was actually litigated in the first forum, the determination must result in a valid and final judgment, the determination must be essential to the judgment which is rendered by, and in, the first forum, the issue before the second forum must be the same as the one in the first forum, and the parties in the second action must be the same as those in the first. **American Casualty Co. of Reading, PA v. Sentry Federal Sav. Bank**, 867 F. Supp. 50, 55 (D. Mass. 1994).

In this case, collateral estoppel cannot be applied because the second element, the requirement of a valid and final judgment, has not been satisfied. The statutory framework of the Massachusetts' workers' compensation statute provides that the conference order entered by the administrative judge pursuant to M.G.L. 152, §10A, shall become the final determination of the Board unless timely appealed. Claimant's counsel has appealed the conference order. Exhibit RX 1-1, therefore, is not final and cannot be given collateral estoppel effect. Accordingly, Claimant's objection to its admission into evidence is hereby **SUSTAINED**.

Post-hearing evidence has been admitted as follows:

Exhibit No.	**Item**	**Filing Date**
RX 1-8	Letter from Employer's counsel dated February 24, 1998 with	02/24/98
RX 1-9	Employer's Brief on the issue of collateral estoppel enclosed	02/24/98

CX 5	Letter dated March 16, 1998 from Claimant's counsel with	03/16/98
CX 6	Claimant's Brief on the issue of collateral estoppel enclosed	03/16/98
RX 1-10	Letter from Employer's counsel dated April 28, 1998 with	04/30/98
RX 1-11	Employer's Closing Brief enclosed	04/30/98
CX 7	Letter dated May 16, 1998 from Claimant's counsel with	05/16/98
CX 8	Claimant's Closing Brief enclosed	05/16/98

The record was closed on May 16, 1998, as no further documents were filed.

Stipulations and Issues

The parties stipulate (TR 6-7), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On August 28, 1996, Claimant suffered an injury in the course and scope of his employment.

4. On August 28, 1996, Claimant gave the Employer notice of the injury.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion on October 14, 1997.

6. The parties attended an informal conference on July 15, 1997.

7. The applicable average weekly wage is $840.00.

8. The Respondents voluntarily and without an award has paid temporary total compensation from August 29, 1996 through June 4, 1997, for a total of $22,401.20 (40 weeks at $560.03 per week).

The unresolved issues in this proceeding are:

1) Whether or not Claimant's injury is causally related to his August 28, 1996 accident;

2) Whether or not Claimant is entitled to temporary total disability benefits from June 5, 1997 to present and continuing; and

3) Whether or not Claimant is entitled to medical benefits accrued on or after June 4, 1997.

Summary of the Evidence

Lawrence J. O'Brien (Claimant herein), a fifty-nine year old father of four children who has completed his education through the eleventh grade and whose only work experience, other than that as an "up" or "down" man, was as a laborer and sandhock, was employed by Employer as an up man for approximately twenty-three years. While employed, Claimant was a "gang boss," which required him to work alongside of a group of men and issue directions to them when needed. As an "up" man, Claimant was responsible for securing containers that had been lifted onto a ship by crane. Claimant would secure the first level by climbing a ladder and for any levels higher than that, he was lifted by crane in a rack. Once at the level he intended to secure, Claimant would either bend down at the waist or get on his hands and knees in order to secure the pins and hold the container in place. It would take roughly twenty to thirty minutes to secure each level of containers.

On August 28, 1996, Claimant was on the dock at Castle Island, known as the Colony Terminal (TR 26), a maritime facility adjacent to the navigable waters of Boston Harbor where he had duties of moving locking pins which were laying on the ground in an area where Claimant did not think they should be. Claimant, who held a pin in each hand, slipped on some other pins that remained on the ground and fell on his back. When he stood up and started to walk, he described his leg as feeling numb. His boss saw him limping, which he had never previously done, and told him to submit a report. The Claimant did just that, complaining that he fell on his back and that his leg was numb. Claimant then went home.

The next day, Claimant was subjected to a urine test at work. He then went to see his personal physician, Dr. Jacquar, with complaints of sharp back pain and a limp. A week or two later,

Claimant was examined by Dr. Jacques of the Boston University Medical Center.

Claimant has not worked since he saw Dr. Jacques, with whom Claimant recalled discussing the possibility of surgery “down the road.” (TR 55) The Doctor sent Claimant to physical therapy for a few months and Claimant underwent alternate heat and cold treatment. The therapist also “fooled around” with his back a little and Claimant stated he was unable to do some of the things that the therapist requested of him. (TR 28) The Claimant described that he did not feel too pleased about this therapy because it required a commute to get himself there. After therapy, the Claimant felt better, but the commute home generally ruined the relief. This left Claimant feeling frustrated. (TR 30)

Claimant, however, was not comfortable with the care rendered by Dr. Jacques and went under the care of Dr. Weiner at Metro West Medical Associates in approximately December 1996. (TR 31) Claimant is presently under the care of his primary care physician, Dr. Melville. He takes Motrin at least two times a day. Despite being instructed by the physical therapist to try to do exercises at home, Claimant simply has not. (TR 53-54)

In a September 11, 1996 report, Dr. Emilio Jacques, Jr., of the Boston University Medical Center states that in his opinion, based upon a reasonable degree of medical certainty, Claimant's symptoms and complaints, objective and subjective findings are causally related to the industrial accident he was involved in on August 28, 1996. Dr. Jacques further opined that Claimant was disabled from any gainful employment at that time. (CX 3) The Doctor issued, among other things, full instructions for a home program of passive physical therapy exercises to include stretching and strengthening exercises, recommended moist heating therapy, and prescribed Ultram. An updated report issued on October 1, 1996 recommended a continuation of the therapy, prescribed Feldene and reiterated the Doctor's opinion regarding causation. Over the course of the next few months, Dr. Jacques adjusted Claimant's prescription to Robaxin, Percocet, and finally Motrin. The Doctor's last report is dated January 14, 1997 and he reaffirms his opinion as to causation and that Claimant is totally disabled.

In December of 1996, Claimant fell down eight stairs and landed on a deck when his right leg, the leg which he injured on August 28, 1996, gave out. (TR 35) On December 11, 1996 he was seen at the New England Medical Center emergency department with complaints of right shoulder, lower back, and right leg pain which he informed the examining physician was caused by a fall when his leg gave out from beneath him. Claimant, who was diagnosed with shoulder and back strain and contusion, was instructed to apply ice to his shoulder and to take one 800 mg tablet of Motrin three times a day. (CX 1)

Claimant went to Metro Medical Associates and underwent an initial evaluation by Dr. Mark Weiner on December 23, 1996 for injuries sustained in the August 28, 1996 accident and Claimant informed the Doctor of his recent fall down the stairs. (CX 2) An MRI was performed at the referral of Dr. Weiner at the Shields Health Care Group on January 13, 1997. The report concluded "L3-L4 intervertebral disc left posterolateral herniation with mass effect upon the exiting left L4 nerve root just beyond the neural foramen and with mass effect upon the left L3 dorsal root ganglion. L4-L5 intervertebral disc small right posterior and right paramedian herniation." (CX 4; EX 1-2) The Doctor initiated Claimant on a program of physical therapy which, on February 4, 1997, the Doctor noted produced no improvement. The Doctor also noted "Diagnosis and disability are, in my opinion, causally related to the August 28, 1996 work related injury." (CX 2) The Doctor referred Claimant for an EMG and on March 11, 1997, the EMG revealed mildly abnormal nerve conduction study showing evidence consistent with a mild, primarily axonal, polyneuropathy. No EMG evidence of right lumbosacral radiculopathy or plexopathy. (CX 2; EX 1-3; EX 1-4) Dr. Weiner's neurology follow-up, dated April 8, 1997 (CX 2/EX 1-4), notes that the MRI revealed an L4-5 disc herniation, but that the EMG did not reveal evidence of radiculopathy or denervation. Dr. Weiner, concluding that surgery would be of no benefit to Claimant, recommended a lumbar Cortisone block. The Doctor closed his report by noting that Claimant remained disabled.

On May 13, 1997, Dr. Weiner, whose impression at that time was right sciatica, secondary to the right L4-5 disc herniation, continued to recommend Cortisone injection and lumbar block to try and deaden some of Claimant's pain symptoms. The Doctor noted "Apparently this is not as yet been approved by Worker's Compensation" and that "this recommendation remains intact." (CX 2) Claimant was last seen on August 12, 1997 and Dr. Weiner, who on that date diagnosed Claimant with a lumbar strain and left rotator cuff injury, was of the opinion that he was totally disabled from the date of the accident through August 12, 1997. (CX 2) On October 20, 1997, the Doctor states he would not be able to provide any further opinion other than that which was expressed in his August 12, 1997 notes because he had not examined Claimant since that time.

According to Claimant, Dr. Weiner recommended a "blockage," although Claimant does not know what this procedure is. The Doctor, who was supposed to explain the procedure to Claimant, did not explain the procedure prior to moving his office. (TR 33) Claimant never saw him again.

A November 17, 1997 report by Dr. Moo K. Kim at Metro Medical Associates indicates

CURRENT COMPLAINTS

> The patient is now returning for further evaluations to see if he requires further treatment sessions... There have been no further symptom changes noted other than the continuous discomfort in the low back and the radiating symptoms without resolution.... All of his physical function has been interrupted with the symptom aggravations... Apparently, the invasive modality of most likely epidural injections was waiting for the approval from his insurance carrier.
>
> PHYSICAL EXAM
> Patient's findings remain unchanged since the last exam. He continues with lumbar tenderness and restricted motion. There are no motor or sensory deficits.
>
> DIAGNOSTIC IMPRESSION
> Because of his unresolving symptoms and trial of the treatment sessions including physical therapy and medications, I have no further suggestions regarding physical treatment. Most likely the patient is reaching the near end of medical treatment sessions at this time. The invasive modalities which the patient has not tried in the past might be worthwhile in view of his positive findings. Because the patient cannot get the invasive modalities I renewed the medications of Motrin and suggest continued follow up for the prescriptions which can be arranged by his primary care physicians. The patient will be discharged with the maximum benefit. No further follow up is arranged. (CX 2)

On May 27, 1997, Dr. DeWitt C. Brown performed an independent medical evaluation of Claimant. The Doctor, who noted that he was having difficulty obtaining a history on the Claimant due to Claimant's vagueness and uncooperativeness and also noted that Claimant would not "cooperate for any type of significant physical exam", states that Claimant moved about the examining room without a limp. The Doctor summarized his comments and conclusions

> As stated above, [Claimant] was very uncooperative on today's examination. In fact, it was nearly impossible to carry out an orthopedic examination. However, based upon today's limited physical examination, there were no objective findings. On the basis of his MRI report and his EMG report I do feel that he probably had a contusion, which should not be associated with any permanent sequela. With regard to his maximum medical improvement, in the best of my medical opinion, on the basis of his medical records, my physical examination and an essentially normal MRI scan and EMG study, I do feel that he has reached his medical end result. In my opinion, Mr. Cooper (sic) is capable of returning to a full-duty work status, at this time. (EX 1-6)

On September 4, 1997 Dr. Brown updated his report and took into consideration the January 13, 1997 MRI results. The Doctor opined that the MRI did not in any way change his opinion that Claimant's low back and right leg pain had essentially resolved without any sequela and that he was fit for duty. (EX 1-5)

According to Claimant, the examination by Dr. Brown, who opined that Claimant had no limp and was capable of full-duty status, took approximately five minutes. (TR 64) Claimant stated he was fully clothed for the examination and the Doctor merely asked him to bend left, bend right, and then dismissed him.

On December 31, 1996, Dr. Douglas Bentley of Boston Medical Evaluations examined Claimant. The Doctor noted that Claimant presented with "the strong odor of ethanol on him and was ambulating with a staggering gait" (EX 1-7) and also that there was a lack of cooperation during examination. Dr. Bentley diagnosed Claimant with acute contusion and strain, lumbar spine and contusion and strain, right shoulder with a questionable rotator cuff tear. The Doctor stated Claimant's prognosis for recovery was fair and opined that he could not "make a causal connection between" Claimant's fall down the stairs and the August 28, 1996 accident at work and that it was his opinion that the fall down the stairs was a "separate event." The Doctor noted that Claimant had "sufficient positive objective findings today to corroborate his ongoing subjective complaints." In Dr. Bentley's opinion, Claimant was indeed disabled from doing his normal longshoreman duties due to his lower back injury. The Doctor suspected, however, that Claimant should recover within 3-4 weeks with appropriate therapy, rehabilitation and treatment.

As of the date of hearing, Claimant testified his back still bothered him, as did his leg. He walks with a limp in his leg, although he does not experience constant pain. He described his leg pain as an occasional shooting pain which has made him fall a number of times. (TR 42) He has no muscle tone because he is unable to do anything. Claimant collects social security disability and believes he is eligible for a pension, although he has not applied.

Claimant, who can read, add and subtract, but who does not have a driver's license, has not searched for work since his injury. Although Claimant enjoyed working and would like to go back, he stated he is "afraid." (TR 61)

Claimant testified that he cannot now perform the duties of an "up" man because his back bothers him and he worries about his leg. (TR 38) In fact, Claimant's back pains him when he merely does the dishes for about ten minutes. He has started wearing loafers because he cannot bend over to tie his shoes and he has started sitting on an old fashioned wooden chair when he watches television

because the couch bothers him. Sometimes, Claimant can sit through a whole half hour or one hour show, but generally he gets up and walks about a bit. When Claimant was working as an “up” man, he could not stop and sit and rest whenever he needed to. He described that an hour and a half was too long for him to sit and that he could stand for between an hour and an hour and a half if he had to. (TR 62)

Claimant, who is alone most of the days because his wife works, spends the majority of his time sedentary, walking around the block to get the newspaper and takes an occasional walk in the afternoon. He gets up three or four times a night. He helps his wife with the dishes and makes the bed, but does not do any dusting, laundry, or “picking up.”

On the basis of the totality of this record and having observed the demeanor and having heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff’d**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first

instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his back and leg pain, resulted from conditions that existed at the Employer's maritime facility. The Respondents have introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes that Claimant's maritime employment at the Employer's facility has resulted in back

and leg pain, that the Respondents had timely notice of such injury, that the Respondents have, through June 4, 1997, authorized appropriate medical care and treatment and has paid certain compensation benefits, as stipulated by the parties (TR 6-7), and that Claimant timely filed a claim for benefits once a dispute arose between the parties. In fact, the issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Claimant has testified that, due to his injury, his is unable to return to his work as a longshoreman. (TR 38) On the basis of the totality of this closed record, I find and conclude that Claimant has established he cannot return to work as an “up” man. The burden thus rests upon the employer to demonstrate the existence of suitable alternative employment in the area. If the employer does not carry this burden, claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Respondents did not submit any evidence as to the availability of suitable alternative employment, as is further discussed below. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff’d on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has not become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

On the basis of the totality of the record, I find and conclude that Claimant has not reached maximum medical improvement. Dr. Weiner, in a medical report dated May 13, 1997, expressed his opinion that Claimant would benefit from Cortisone injection and lumbar block. He also noted, however, that this recommendation was not approved by the Employer. In regards to the conflicting interpretations rendered by Dr. Weiner and Dr. Brown upon examination of Claimant's MRI and EKG results and their respective examinations of Claimant, this Judge finds the opinion of Dr. Weiner to be more credible and persuasive. Although Dr. Weiner forthrightly opined that there was no evidence of right lumbosacral radiculopathy or plexopathy, he did find evidence of herniation and, as of May 13, 1997, right sciatica. Dr. Brown, however, offers the vague opinion that the MRI and EKG results were "essentially" normal.

Furthermore, Dr. Kim, the physician who was the last to examine Claimant according to the medical evidence of record, only noted that "the patient is reaching the near end of medical treatment sessions." He also noted that invasive modalities might be worthwhile in view of Claimant's positive findings. In view of the foregoing, I find and conclude that Claimant remains temporarily totally disabled.

Suitable Alternate Employment

As the Claimant has met his burden of proving the nature and extent of his disability and his inability to return to work, the next question is whether the Respondent can produce sufficient evidence to reduce Claimant's disability status from total to partial. In the majority of jurisdictions, once a claimant meets his or her initial burden, the burden then shifts to the employer to demonstrate the existence of suitable alternative employment or realistic job opportunities which the claimant is capable of performing and which the claimant could secure with diligent effort. **See Pietrunti v. Director, OWCP**, 119 F.3d 1035, 1041 (2d

Cir. 1997). The First Circuit, however, under whose jurisdiction this case arises, has a different approach as to when the burden will switch to the employer.

The First Circuit has held that the severity of an employer's burden must reflect the realities of the situation, and that the burden will not shift in all cases. As such, the First Circuit does not place the burden on an employer in situations where it is obvious that there are available jobs that someone of the claimant's age, education and experience could perform. **See generally Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979). The Benefits Review Board has described the First Circuit's **Air America** holding as follows:

> [T]he strength of the presumption of total disability, and hence the severity of the employer's burden to overcome the presumption, should reflect the reality of the situation. The [First Circuit] determined that, depending on the situation, employer may not have the heavy burden of establishing actual job opportunities. The court, however, also recognized that it is reasonable to require the employer to prove the availability of specific suitable alternate jobs when an employee's inability to perform any work seems probable in light of the employee's physical condition and other circumstances, such as employee's age, education and work experience.

Dixon v. John J. McMullen & Assoc., 19 BRBS 243 (1986).

In **Air America**, the claimant was a pilot who contracted a tropical disease while working in Southeastern Asia. **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979). This disease left the claimant with varying degrees of numbness in his limbs and extremities, and rendered him unable to continue his employment as a pilot. In light of the claimant's education and ability, the court noted that is was obvious that claimant could find available employment, and therefore, it was not necessary for the employer to present evidence of suitable alternate employment. **Id.** at 779. The court stated that if a "medical impairment affects only a specialized skill that is necessary in [the claimant's] former employment, his resulting inability to perform that work does not necessarily indicate an inability to perform other work, not requiring that skill, for which his education and work experience qualify him." **Id.**; **see also Argonaut Insurance Co. v. Director, OWCP**, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981) (holding that a young, intelligent man was not unemployable).

The **Air America** court, however, limited its holding, noting that this standard is not applicable where "the claimant's medical impairment and job qualifications [are] such that his suitable job

prospects would be expected to be very limited, if existent at all." **Id.** at 780. The court provided a list of several cases where claimant's future employment opportunities would be sufficiently limited to require the burden be placed on the employer to find suitable and available alternate employment. In each of the cited cases, the particular court stressed claimant's work experience and educational background as relevant in determining future job prospects. **See American Stevedores, Inc. v. Salzano**, 538 F.2d 933, 935-36 (2d Cir. 1976); **Haughton Elevator Co. v. Lewis**, 572 F.2d 44, 935 n.1 (4th Cir. 1977); **Diamond M. Drilling Co. v. Marshall**, 577 F.2d 1003, 1006-09 (5th Cir. 1978); **see also Air America, Inc. v. Director, OWCP**, 597 F.2d. 773, 779 (1st Cir. 1979) ("In each case the Review Board cites, the claimant's physical impairment, education, and work experience were such as to render him theoretically capable of performing 'only a special and very limited class of work'") (quoting **Perini Corp. v. Heyde**, 306 F. Supp. 1321, 1326 (D.R.I. 1969)). Therefore, in cases arising within the jurisdiction of the First Circuit, the court must make an initial determination as to whether the facts present a situation where the burden should switch to the employer. **See Nguyen v. Ebbtide Fabricators, Inc.**, 19 BRBS 142, 145 n.2 (1986) (noting that the Board does not follow **Air America** outside of the First Circuit).

After the **Air America** decision, several cases have focused on when the burden will remain with the employer, falling under the limiting language in **Air America**. For example, in **CNA Insurance Co. v. Legrow**, 935 F.2d 430 (1st Cir. 1990), the First Circuit rejected the employer's argument that **Air America** should control. **Legrow** involved a claimant who suffered a back injury and could not return to his position that required heavy lifting. Following the injury the employer brought claimant back to perform part-time clerical work, at approximately ten-hours a week, and claimant also worked briefly as a security guard. The Benefits Review Board concluded that such activity was sheltered employment and did not constitute suitable alternate employment. **Id.** The First Circuit affirmed, also noting that the claimant's "brief stint as a security" guard did not constitute suitable alternate employment, because the record did not contain any information regarding how the claimant was able to perform the job or what the duties were. The employer had argued that **Air America** should apply, however, the court rejected this argument, noting, "This case . . . is a long way from **Air America** . . . . Although Legrow has a bachelor's degree in business administration, as well as prior office experience in addition to his managerial employment . . ., evidence of his efforts with the ten-hour a week office job with [his employer] justified the Board's determination that the ALJ could not find that Legrow has any real ability to work in a typical office setting." **Id.** at 435. The court, citing **Air America**'s language limiting its application in cases where the future

prospects of the Claimant are limited, held that the employer had failed to satisfy its burden of proving the existence of suitable alternate employment. **Id.**

Similarly, in **Dixon v. John J. McMullen & Associates**, 19 BRBS 243 (1986), the Benefits Review Board, in a case arising within the jurisdiction of the First Circuit, upheld an administrative law judge's determination that **Air America** did not apply. **Id.** at 246. Specifically, the Board affirmed the administrative law judge's finding that because a Claimant was unable to perform a job not involving physical labor and his education prevented him from working at a desk job, the employer had the burden to establish suitable alternate employment. **Id.**; **see also Rinaldi v. General Dynamics Corp.,** 25 BRBS 1288 (1991).

In the present case, Claimant's situation is far from that of the pilot in **Air America**. On these facts, the Claimant, fifty-nine year old gentleman, has only an eleventh grade education. He was employed as an "up" man for approximately twenty-three years. Accordingly, this is a situation where Claimant's "medical impairment and job qualifications [are] such that his suitable job prospects [are] limited, if existent at all." Therefore, I find and conclude that the burden switches to the Respondents to show both the availability and suitability of alternate employment opportunities. **See CNA Insurance Co. v. Legrow**, 935 F.2d 430 (1st Cir. 1990). Therefore, to meet its burden the Employer "must demonstrate that available employment exists which Claimant, by virtue of his age, education, vocational history, and physical restrictions, was capable of performing." **Rinaldi v. General Dynamics Corp.**, 25 BRBS 128, 131 (1991).

Respondents have failed to offer any evidence demonstrating the availability of suitable alternate employment or realistic job opportunities which Claimant could secure if he diligently tried. As such, I find the Claimant is temporarily and totally disabled from August 28, 1996 to present and continuing.

Intervening Event

The issue in this case is whether any disability herein is casually related to, and is the natural and unavoidable consequence of, Claimant's work-related accident or whether the December 1996 fall down the stairs constituted an independent and intervening event attributable to Claimant's own intentional or negligent conduct, thus breaking the chain of causality between the work-related injury and any disability he may now be experiencing.

The basic rule of law in "direct and natural consequences" cases is stated in Vol. 1 **Larson's Workmen's Compensation Law** §13.00 at 3-348.91 (1985):

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause [event] attributable to claimant's own intentional conduct.
>
> Professor Larson writes at Section 13.11:
>
> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.
>
> The simplest application of this principle is the rule that all the medical consequences and natural sequelae that flow from the primary injury are compensable . . . The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. (**Id**. at §13.11(a))

This rule is succinctly stated in **Cyr v. Crescent Wharf & Warehouse**, 211 F.2d 454, 457 (9th Cir. 1954) as follows: "If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury." **See also Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mississippi Coast Marine, Inc. v. Bosarge**, 632 F.2d 994 (5th Cir. 981), **modified**, 657 F.2d 665 (5th Cir. 1981); **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981).

Likewise, a state court has held: "We think that in this case the claimant has produced the requisite medical evidence sufficient to establish the causal connection between his present condition and the 1972 injury. The only medical evidence presented on the issue favors the Claimant." **Christensen v. State Accident Insurance Fund**, 27 Or. App. 595, 557 P.2d 48 (1976).

The case at bar is not a situation in which the initial medical condition itself progresses into complications more serious than the original injury, thus rendering the added complications compensable. **See Andras v. Donovan**, 414 F.2d 241 (5th Cir. 1969). Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable as long as the worsening is not shown to have been produced by an independent or non-industrial cause. **Hayward v. Parsons Hospital**, 32 A.2d 983, 301 N.Y.S.2d 649 (1960). Moreover, the subsequent disability is compensable even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real

operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.

However, a different question is presented when the triggering activity is itself rash in the light of claimant's knowledge of his condition. The issue in all such cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications, and denials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist. **Matherly v. State Accident Insurance Fund**, 28 Or. App. 691, 560 P.2d 682 (1977). The case at bar involves a situation in which a weakened body member contributed to a later fall or other injury. **See Leonard v. Arnold**, 218 Va. 210, 237 S.E.2d 97 (1977). A weakened member was held to have caused the subsequent compensable injury where there was no evidence of negligence or fault. **J.V. Vozzolo, Inc. v. Britton**, 377 F. 2d 144 (D.C. Cir. 1967); **Carabetta v. Industrial Commission**, 12 Ariz. App. 239, 469 P.2d 473 (1970). However, the subsequent consequences are not compensable when the claimant's negligent intentional act broke the chain of causation. **Sullivan v. B & A Construction, Inc.**, 122 N.Y.S.2d 571, 120 N.E.2d 694 (1954). If a claimant, knowing of certain weaknesses, rashly undertakes activities likely to produce harmful results, the chain of causation is broken by his own negligence. **Johnnie's Produce Co. v. Benedict & Jordan**, 120 So. 2d 12 (Fla. 1960).

The Benefits Review Board reversed an award of benefits to a claimant who had sustained an injury to his left leg, when he fell from the roof of his house after his injured knee collapsed under him, while attempting to repair his television antenna. Eighteen months earlier this claimant had injured his right knee in a work-related accident, such claimant receiving benefits for his temporary total disability and for a rating of fifteen percent permanent partial disability of the leg. The Board reversed the award for additional compensation resulting from the second injury. **Grumbley v. Eastern Associated Terminals Co.**, 9 BRBS 650 (1979). The Benefits Review Board held, "[U]nder Section 2(2) of the Act, the second injury to be compensable must be related to the original injury. Therefore, if there is an intervening cause or event between the two injuries, the second injury is not compensable. Thus, this Administrative Law Judge must focus on whether the second injury resulted 'naturally or unavoidably.' Therefore, claimant's action must show a degree of due care in regard to his injury." Furthermore, the Board held, "[c]laimant obviously did not take any such precautions, nor did the record show that any emergency situation existed that would relieve claimant from such allegation." **Grumbley**, **supra**, at 652.

Applying these well-settled legal principles to the case at bar, and based upon the totality of the record, I find and conclude

that Claimant's fall down the stairs in December 1996 was not an intervening cause and, **a fortiori**, it did not break the chain of causality between Claimant's work-related incident and his present condition. Accordingly, the Respondents are responsible for any disability or medical expenses relating to this fall, an event which I find and conclude is not an independent and intervening event breaking the chain of causality between Claimant's work-related disability injury and any disability he may now experience.

On this issue, I accept Dr. Weiner's opinion expressed in his February 4, 1997 report that Claimant's diagnosis and disability are causally related to the August 28, 1996 work-related injury. It is clear from the medical evidence of record that Dr. Weiner, who treated Claimant from December 23, 1996 through August 12, 1997, was the physician with the most significant contact with Claimant. I reject Dr. Bentley's opinion that the fall down the stairs and the work-related injury were "separate events" and, instead, rely upon the well-reasoned opinion of Claimant's long-treating physician, Dr. Weiner.

Accordingly, the Respondents are responsible for any disability or medical expenses relating to the December 1996 injury, an event which I find and conclude does not constitute an independent and intervening event.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 556 (1978), aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979); Santos v. General Dynamics Corp., 22 BRBS 226 (1989); Adams v. Newport News Shipbuilding, 22 BRBS 78 (1989); Smith v. Ingalls Shipbuilding, 22 BRBS 26, 50 (1989); Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988); Perry v. Carolina Shipping, 20 BRBS 90 (1987); Hoey v. General Dynamics Corp., 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, 16 BRBS 267, 270 (1984), modified on reconsideration, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258

provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Accordingly, Respondents are liable for the reasonable, appropriate and necessary medical expenses incurred by Claimant because of his August 28, 1996 work-related injury. This Judge again notes that I have previously found that Claimant's December 1996 fall down the stairs did not act as an intervening event. Respondents are, therefore, responsible for those medical expenses incurred subsequent to that fall.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Respondents. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondents' counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any

filing. This Court will consider only those legal services rendered and costs incurred after July 15, 1997, the date of the informal conference. Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Respondents shall pay to the Claimant compensation for his temporary total disability from August 28, 1996 through the present and continuing, based upon an average weekly wage of $840.00, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Respondents shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his August 28, 1996 injury.

3. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on July 15, 1997.

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jw